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In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 550

JAMES ARENA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (R. 251–267; Pet. App. i–xxii) is reported at 226 F. 2d 227.

JURISDICTION

The judgment of the Court of Appeals was entered on October 5, 1955 (R. 268), and a petition for rehearing was denied on November 7, 1955 (R. 269). The petition for a writ of certiorari was filed on December 3, 1955. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether, in a prosecution for perjury in the course of a grand jury investigation of income tax evasion as the result of gambling activities, there was a proper foundation for admitting in evidence account books, check stubs, and checks of a deceased betting commissioner reflecting certain bets placed by petitioner.

2. Whether the betting commissioner's widow, who had worked for him in his betting business and was familiar with these records, was properly permitted to testify as to the meaning of certain symbols in them.

3. Whether the evidence was sufficient to sustain petitioner's conviction of perjury, where there was the direct testimony of a single witness as to the falsity of petitioner's statement before the grand jury and corroborative evidence supporting that witness's version of the events.

4. Whether the court's charge, that perjury could be proved by the testimony of a single witness in addition to trustworthy corroborative evidence substantiating the testimony of that witness, was correct.

5. Whether an indictment covering one principal transaction involving perjury, as distinguished from separate and independent incidents, was duplicitous.

STATUTES INVOLVED

18 U. S. C. 1621, 62 Stat. 773; provides:

> Whoever, having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed, is true, willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true, is guilty of perjury, and shall, except as otherwise expressly provided by law, be fined not more than $2,000 or imprisoned not more than five years, or both.

28 U. S. C. 1732 (a), 62 Stat. 945, provides:

> In any court of the United States and in any court established by Act of Congress, any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence, or event, shall be admissible as evidence of such act, transaction, occurence, or event, if made in regular course of any business, and if it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence, or event or within a reasonable time thereafter.

All other circumstances of the making of such writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but such circumstances shall not affect its admissibility.

The term "business", as used in this section, includes business, profession, occupation, and calling of every kind.

STATEMENT

Petitioner was charged in the United States District Court for the Northern District of California in a two-count indictment (R. 3–7) with perjury before a federal grand jury in violation of 18 U. S. C. 1621 (*supra*, p. 3). He was convicted under the first count (R. 26),[1] and sentenced to imprisonment for three years (R. 33-34). On appeal (R. 35), the conviction was unanimously affirmed (R. 268).

The pertinent evidence may be summarized as follows:

In May 1953, the grand jury was making an investigation of tax evasion by Arthur Samish and one Flynn in connection with income from their gambling activities (R. 49–51). Zola (Tiny) Heller, who died in January 1952, operated a hotel, bar and liquor store in the same building, and also operated as a betting commissioner with

[1] The court sustained petitioner's motion for acquittal on the second count, which was not submitted to the jury (R. 25, 176–177).

a small office in the back of his liquor store (R. 78, 80, 133). Irving Baskin took care of the records of Heller's legitimate businesses and did his banking (R. 79). The perjury charge grew out of petitioner's testimony as to transactions with Baskin, which defense counsel stipulated to be material to the investigation (R. 61, 64, 198).[2]

Before the grand jury, petitioner had testified that he had known Irving Baskin and Tiny Heller; that he had placed some small bets of $20 or $30 with Heller; and that the most he had ever won was about $100 (R. 70–72). The testimony charged in count one of the indictment (R. 4–5) as being perjurious was as follows (R. 73–75):

> By Mr. Olney:
>
> Q. I see. On this occasion Mr. Baskin says you accompanied him to the bank while he proceeded to cash some checks in return for which there were 38 one thousand dollar bills which were obtained from the bank, and that the teller counted that $38,000 out in your presence, to him and he in turn counted the $38,000 in these one thousand dollar bills to you and gave you the bills.
>
> A. I didn't get them, sir.

[2] Exhibit 1 was a transcript of petitioner's grand jury testimony, parts of which were read to the jury (R. 55). Since the defense did not offer any evidence, the only exhibits referred to are those of the government.

Q. Did that happen?

A. No, sir.

Q. Anything like it?

A. No, sir.

Q. Did you ever go there to the bank with this Baskin?

A. No, but I was in that bank most every single day in my own business. I have seen and been in there dozens of times, I will say, but I am always in that bank every single day ever since I had my liquor business, that is where I used to bank.

Q. Has Mr. Baskin ever delivered any money to you?

A. No, sir.

Q. Even one cent?

A. Never had occasion to.

By Mr. BURKE:

Q. Your testimony is that on no occasion did anyone ever pay you any amount of money, one dollar or $38,000, to be delivered to you personally as your own money or on behalf of Mr. Samish or anyone else?

A. That's correct, Mr. Burke.

By the FOREMAN:

Q. Did you ever do any business with Mr. Baskin or have any transaction with Mr. Baskin in any bank in Oakland?

A. I did not, sir.

Q. And you never received $38,000 from Mr. Baskin?

A. No, sir.

At the trial, Baskin testified that during 1947 he would see petitioner in Heller's place of business about three or four times a week (R. 88). Contrary to petitioner's testimony before the grand jury (R. 74), Baskin stated that on two or three occasions he delivered sealed envelopes from Heller to petitioner at the latter's liquor store (R. 89). As to the incident involved in count one of the indictment, Baskin testified that in December 1947 Heller gave him four checks, one of which was Heller's personal check, making a total of $38,000, and directed him to go to the bank and "get them cashed into one thousand dollar bills and then give them to Jimmy [petitioner]" (R. 90–92). Petitioner and Baskin then walked several blocks from Heller's office to the bank, where a teller named Wirth[3] got authority from his superior, Madeiros, to cash the checks, and counted out 38 one thousand dollar bills (R. 92–95). Baskin testified (R. 95–96): "Then I called [petitioner] over and I counted the money over to him. He took the money, put it in his pocket."

Madeiros, the assistant bank cashier, testified that on December 4, 1947, $38,000 was paid on behalf of Heller by a bank teller named Wirth, after Madeiros had obtained approval for this from senior bank officers. The payment was for

[3] Wirth was deceased at the time of trial (R. 187).

four checks, one of which was Heller's personal check for $6,050 payable to cash, and the others in amounts of $13,700, $9,350, and $8,900, for a total of $38,000. (R. 158–163, 166; Exs. 11 and 12.) Madeiros testified that Heller's check for $6,050 (Ex. 8) had been indorsed by Baskin, with whose signature Madeiros was familiar (R. 163–164).

Witness Whitted worked for Heller from 1941 to 1947, one of his duties being to fix the odds on football and baseball games (R. 100–101). Whitted stated that he saw petitioner on Heller's premises about five or six days of the week (R. 102). During 1941 and 1942, petitioner made only small bets of from $20 to $50, but in 1946 and 1947 they ranged from $100 to $3,000 (R. 105). Whitted recorded some of these bets (R. 106). In the earlier years, Samish placed his own bets which were recorded as "AS"; later, from 1945 to 1947, the bets were made by petitioner for Samish and recorded as "SA" (R. 121–122). Exhibit 10 showed five football parlay card bets recorded by Whitted for petitioner on behalf of Samish on October 26, 1946, which resulted in a $7,900 win (R. 108, 109, 125, 131). Whitted overheard telephone calls from Heller's office by petitioner to Samish for the purpose of arranging bets (R. 123–124). Whitted also saw Heller

make large bet payments of several thousand dollars to petitioner (R. 131, 132).[4]

Heller's widow testified that he conducted some of his business from his home; that she sometimes worked at the betting office; and that on occasions she recorded bets for him, including a bet by petitioner (R. 133–134, 139). Mrs. Heller identified Exhibit 3 as representing Heller's betting records for the "week ending 11/30/47". The first three pages of this exhibit showed that Samish, indicated by "S. A.", had won $34,800 (R. 142–143, 145). Exhibit 5 contained a check stub for Check No. 1670, dated December 3, 1947, to the "S. A." account of Samish, and Exhibit 8 was Heller's check, with the same number as the check stub, for $6,050, dated December 3, 1947 (R. 143).

ARGUMENT

1. Petitioner contends that Exhibits 2 through 8 (Heller's account books, check stubs, and checks) were improperly admitted in evidence by reason of insufficient foundation (Pet. 10–13). There is clearly no merit to this point.

[4] Before the grand jury, petitioner denied knowing anything about five football parlay cards for October 26, 1946, with the initials "J. A.". Petitioner also denied before the grand jury that he had placed any bets with Whitted, including the October 26, 1946 bets represented by Exhibit 10. (R. 168–169.)

Baskin testified that he had occasion to examine and was familiar with Heller's betting commission records (R. 81–82). He identified the challenged exhibits, all of which were later admitted in evidence, as being in Heller's handwriting (R. 82–87). Exhibit 2 was Heller's account book reflecting bets made (R. 82, 118, 134–135). Exhibit 3 was the kind of record on which Heller would jot down bets as they came in over the telephone (R. 83, 118–120, 135–136). Exhibits 4 and 5 were Heller's check stub books (R. 84–85, 137). Exhibits 6, 7 and 8 were checks in Heller's handwriting, dated October 28, 1946, October 30, 1946, and December 3, 1947, respectively (R. 86–87, 137–138).

Whitted had seen Heller making entries in Exhibit 2, and recognized Heller's handwriting in it (R. 118). He also saw Heller working on books like Exhibit 3, and identified Heller's handwriting therein (R. 118–120). Mrs. Heller identified Exhibits 2 through 8 as business records in Heller's handwriting, kept in connection with his betting commission business (R. 134–138). The exhibits were admitted first as exemplars of certain business records kept by Heller, but later the court stated they were "admitted as ordinary business records" (R. 136, 137, 138, 141).

All this testimony rendered the exhibits admissible under 28 U. S. C. 1732, *supra,* pp. 3–4. The purpose of the federal "shop book" statute is to

facilitate admission in evidence of records which experience has shown to be trustworthy, and it should be "liberally interpreted so as to do away with the anachronistic rules which gave rise to its need and at which it was aimed". *Palmer* v. *Hoffman*, 318 U. S. 109, 115. Applying that rule here, it is clear that a sufficient foundation was laid for the introduction of the records. Obviously, the fact that Heller, the maker of the records, could not testify by reason of his death did not operate to make them inadmissible. The three witnesses who did testify were thoroughly familiar with his bookkeeping methods, and had close relationships to his betting business, so that their testimony involved direct knowledge—not mere conclusions or surmise.

There is nothing in the statute, or in the cases cited by petitioner, expressly requiring that a person testifying shall be the custodian of the records or the supervisor of the persons making the records—although this can be, and often is, the case. The three witnesses possessed the most important qualifications for testimony regarding the records, *i. e.,* intimate and reliable knowledge of the fact that these records were kept in the regular course of Heller's business, the manner in which they were kept, and what they meant. It was not necessary that their testimony embody formalistic words that the records were entered in "the regular course of such business"; that the records

were so made was implicit in the nature of the transactions as to which testimony was given. *Cf. Korte* v. *New York, N. H. & H. R. Co.*, 191 F. 2d 86, 90–91 (C. A. 2), certiorari denied, 342 U. S. 868. Neither was it of controlling importance that in some instances the witnesses could not positively identify the particular record, so long as they were certain it was the kind or type of record maintained by Heller in the regular course of his business. *Cf. Wheeler* v. *United States*, 211 F. 2d 19, 21–23 (C. A. D. C.), certiorari denied, 347 U. S. 1019.

Whether the authenticity of documentary records has been sufficiently proved to justify their admission in evidence is a matter resting within the sound discretion of the trial judge. *Cf. Lewis* v. *United States*, 38 F. 2d 406, 416 (C. A. 9); *Morgan* v. *United States*, 149 F. 2d 185, 188 (C. A. 5), certiorari denied, 326 U. S. 731. The court below correctly held that this discretion was not abused here (Pet. App. xvii).

2. Since Exhibits 2 through 8 were rightly admitted in evidence, Mrs. Heller was properly permitted to testify as to the meaning of symbols in the exhibits, *e. g.*, that "S. A." referred to the Samish account (see Statement, *supra*, pp. 8–9).[5]

[5] Mrs. Heller testified as to occasions when petitioner was present at Heller's home to make bets, and made telephone calls to Samish (R. 152–154). Since Whitted had also testified that "S. A." referred to bets made by petitioner for Samish (R. 120–121), Mrs. Heller's testimony on this was cumulative.

Petitioner's contention that Mrs. Heller was not sufficiently familiar with the contents of the exhibits to qualify her as a competent witness (Pet. 13–15) is refuted by the record. She had worked for her husband in connection with his betting, both at home and in his office, and on occasions had herself recorded bets. She knew the exhibits as records maintained by her husband in connection with his betting business, and identified his signature on all the exhibits. (*Supra*, pp. 9, 10.) The fact that she did not herself make entries in the exhibits was immaterial, in view of her adequate knowledge as to the manner of keeping the records and their meaning. Persons familiar with documentary records may testify as to the meaning of symbols and abbreviations used in them. *Cf. United States* v. *Hardyman*, 13 Pet. 176; *Meyer* v. *Everett Pulp & Paper Co.*, 193 Fed. 857, 862 (C. A. 9); Note, 100 A. L. R. 1465.

3. Petitioner also urges (Pet. 16–20) that the evidence was insufficient to sustain the perjury conviction because the testimony offered in corroboration of Baskin's testimony did not directly relate to the alleged falsity of petitioner's testimony that he received no money from Baskin.

Baskin testified (R. 95–96) that he delivered 38 one thousand dollar bills to petitioner in the presence of the teller Wirth at the bank, this being contrary to petitioner's grand jury testimony (R. 73–75) (*supra*, pp. 5–7). His testimony

was corroborated by Exhibits 11 and 12, bank records showing the cashing of four checks totaling $38,000, and Madeiros' testimony that one check (Exhibit 8) was Heller's for $6,050, and had been indorsed by Baskin (*supra*, pp. 7–8, 9).

There was also evidence from Heller's books strongly tending to show that the $38,000 was in payment of recent winnings on bets by Samish, and also evidence that petitioner regularly acted as agent in making bets with Heller for Samish, and that on other occasions petitioner had received large sums of money from Heller (*supra*, pp. 8–9).

It is true that the corroborative evidence did not directly *prove* that Baskin had disposed of the $38,000 by delivering it to petitioner. We do not, however, read the perjury cases as requiring that the corroborative evidence must itself—apart from the direct testimony of the single witness—establish all aspects of the accused's false testimony. Here, the corroborative evidence was sufficient to meet the requirements of the perjury rule enunciated by this Court in *Weiler* v. *United States*, 323 U. S. 606, 610:

> Two elements must enter into a determination that corroborative evidence is sufficient: (1) that the evidence, if true, *substantiates the testimony of a single witness who has sworn to the falsity of the alleged perjurious statement;* (2) that the

> corroborative evidence is trustworthy. [Emphasis added.] [6]

The additional testimony must be "corroborative," not full proof in itself. There was testimony by Baskin that directly established the falsity of petitioner's testimony and strong evidence tending to corroborate Baskin's version of the events, including the handing over of the $38,000 to petitioner. The rule laid down by this Court in *Weiler* requires no more.

There are, as petitioner points out (Pet. 19–20), general statements in opinions by courts of appeal which may be said to be to the effect that the corroborative testimony must independently tend to show all elements of the perjury. *E. g., United States* v. *Neff,* 212 F. 2d 297, 306 (C. A. 3); *McWorter* v. *United States,* 193 F. 2d 982, 983, 985 (C. A. 5); *United States* v. *Hiss,* 185 F. 2d 822, 824 (C. A. 2), certiorari denied, 340 U. S. 948; *Miranda* v. *United States,* 196 F. 2d 408, 411 (C. A. 9), certiorari denied, 344 U. S. 842. To the extent that judgments of conviction were affirmed under that standard, they present no conflict since the evidence was *a fortiori* sufficient under what we deem to be the proper standard.

[6] Compare VII Wigmore, Evidence (3d ed., 1940), § 2042, pp. 278–279: "As to the *nature of the corroboration*, no detailed rule seems to have been laid down, nor ought to be laid down. The jury should be instructed not to convict unless the testimony of the principal witness has been so corroborated that they believe it to be true beyond a reasonable doubt." [Italics in original.]

In the two leading cases where reversal was predicated on such a ground, *Neff* and *McWhorter*,[7] the evidence was in any event insufficient under the *Weiler* rule, as we interpret it. In *Neff*, to corroborate the testimony of a single witness that he had seen the defendant at Communist Party meetings contrary to her sworn statement, the government introduced evidence that the defendant had collected dues at the union office for the Communist Party, that she had signed a petition to place a Communist candidate on the ballot, and that she had been called a Communist. None of this evidence was directly corroborative of the particular testimony by the single direct witness as to Communist Party meetings, in the sense that the testimony of the bank officer in this case is corroborative of Baskin's testimony as to his cashing of the check at the bank or Baskin's testimony as to the payment to petitioner is corroborated by the documentary and oral evidence that petitioner was Samish's betting agent, that Samish had won at least $35,000 shortly before the cashing of the checks at the bank, and that Heller's records showed his check as credited to Samish

[7] In *United States* v. *Rose*, 215 F. 2d 617 (C. A. 3), cited by petitioner (Pet. 20), the evidence as a whole was found insufficient. In *Radomsky* v. *United States*, 180 F. 2d 781 (C. A. 9), from the circuit which decided this case, there was no direct evidence.

(*supra*, pp. 7–9).[8] Thus, the testimony in *Neff* did not meet the *Weiler* rule that the corroboration should substantiate "the testimony of a single witness who has sworn to the falsity of the alleged perjurious statement", whereas the corroborative testimony here did directly substantiate the witness' testimony in all its significant elements. In *McWhorter*, the government had no independent witness at all, having merely proved by two witnesses that the defendant made prior inconsistent statements under oath.

Under these circumstances, despite the possible implications of the statements in the various opinions cited, we do not believe that there is presented the type of conflict which calls for resolution by this Court, particularly since the correct standard has been clearly set forth by this Court in *Weiler*. Moreover, as the court below noted, dictum in *Warzower* v. *United States*, 312 U. S. 342, 347–348, drew an analogy between the corroboration required in perjury and confession cases, as to the latter of which there had been conflicting views among the various courts of appeal. That conflict was settled by this Court's decisions in *Opper* v. *United States*, 348 U. S. 84, and *Smith* v. *United States*, 348 U. S. 147, that in confession cases the rule is that "the corrobora-

[8] The latter group of corroborative evidence might well be said to "tend to show", in itself, the falsity of petitioner's denial that he received the money from Baskin.

tive evidence need not be sufficient, independent of the statements, to establish the *corpus delicti.*" 348 U. S. at 93; see also 348 U. S. at 156. That rule as to confessions is in accord with what we understand to be the rule laid down as to perjury in *Weiler, i. e.,* that the corroboration need go only to support and substantiate the truth of the testimony of the single witness. The Court's decisions therefore seem now to have settled the problem as to the degree of corroboration required, not only for confessions, but in perjury cases.

4. Closely related to petitioner's argument on insufficiency of the evidence is his contention that the court's charge regarding corroborative evidence in a perjury case was erroneous (Pet. 20–25). The pertinent part of the charge is as follows (R. 230):

> In order to sustain a conviction for perjury there must be direct and positive evidence of the falsity of the statement made under oath. The falsity of the statement made under oath must be proved by clear and convincing evidence. The uncorroborated testimony of one witness is not enough to establish the falsity of the testimony of the defendant. The falsity must be evidence [sic] by the testimony of two independent witnesses, or by one witness and corroborating evidence. In the absence of such proof the defendant must be acquitted.

> By corroborative evidence is meant evidence independent of the testimony of a single witness under oath which substantiates the testimony of that witness. That evidence must be trustworthy. A document such as a bank record or check or business record may constitute corroboration, if you find that it substantiates the testimony of the witness who testified directly as to the falsity of the defendant's statement and is trustworthy.
>
> The trustworthiness of the corroborative evidence is for you to determine.

This instruction stands or falls by whether the decision of the court below on the nature of the corroborative evidence is correct. If, as we believe, the corroboration must be of the direct witness, and not necessarily tend, directly and in itself, to prove all elements of the falsity, it is manifestly correct.

5. Finally, petitioner argues that count one of the indictment was duplicitous, as alleging five separate offenses of perjury instead of the one for which he was convicted (Pet. 25–30).

Clearly, however, all of the questions related to the one separate transaction, *i. e.*, whether Baskin had received the 38 one thousand dollar bills from the teller at the bank and delivered them to petitioner. After petitioner made his original denial before the grand jury that this ever occurred, the ensuing ancillary questions were asked

only for the purpose of emphasizing and clarifying petitioner's denial; they manifestly did not seek to, nor did they cover, other separate and different transactions which Baskin may have had with petitioner at the bank. Petitioner makes no showing that he was embarrassed or confused in the presentation of his defense by reason of a multiplicity of charges. Accordingly, the trial court did not abuse its discretion in ruling that the indictment was not duplicitious. Cf. *Pointer* v. *United States*, 151 U. S. 396, 403–404; *Magen* v. *United States*, 24 F. 2d 325, 326, 328 (C. A. 2), certiorari denied, 277 U. S. 595; *United States* v. *Crummer*, 151 F. 2d 958, 963–964 (C. A. 10), certiorari denied, 327 U. S. 785; *Hovley* v. *United States*, 277 Fed. 788 (C. A. 9). See also Wharton on *Criminal Law*, 12th Ed., Sections 1567, 1582; *United States* v. *Otto*, 54 F. 2d 277, 279–280 (C. A. 2).[9]

[9] In *United States* v. *Seymour*, 77 F. 2d 577 (C. A. 8), on which petitioner relies, the statement indicating that the indictment there might have been duplicitous if the multiple charges had been joined in one count is dictum. In *Seymour*, moreover, the court recognized that the "statements covered by the several counts referred to different matters of inquiry" (at p. 581), in contrast to the instant case where only one transaction is involved.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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